Contingency Real Estate Support

Real Estate Instruments

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Objectives

- Identify real estate interests (estates) typically used in disaster response work
- Identify the various types of real estate instruments and standard forms used in disaster work
- Identify lease clauses that can be negotiated versus those that are mandatory
- Identify basic lease administration actions
- Learn how to modify a lease (essentials of a supplemental agreement)

Estates

- Leasehold - grant use or occupation of real property under contract in exchange for rent or other consideration
- License - permission or authority to do a particular act or series of acts on land of another without possessing any estate or interest therein.
- Right of Entry - bare authority to do a specified act or series of acts on real property without acquiring any interest - formalizes a temporary use where verbal permission will not suffice
- Permit - agreement between two federal agencies or two military departments for use of property

Standard Forms

- Standard Form 2 – Standard Lease
- Standard Form 2b – Short Form Lease
- ENG Form 856 – Land Lease
- Standard Form 1258 – Right of Entry for Survey and Exploration
- Standard Form 2803 - Right of Entry for Construction

Standard Form 2

- Used for leasing improved property in U.S. (includes Puerto Rico, US Virgin Islands, Guam, etc.)
- Typically used for facilities such as
  - Office space
  - Warehouse space
  - Hardstand
  - Cold storage space

Standard Form 2-B

Commonly called short-form lease

Used for leasing improved property in US and its territories

- Housing - Apartment
- Parking
- Minor warehouse space
- Hardstand areas

Used when annualized rent does not exceed $3,600 except for housing

When used for housing, may exceed $3,600

Standard Form 856

- Used for leasing unimproved property in US and overseas
- When used overseas is translated into appropriate language

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Standard Right of Entry Forms

- Standard Form 1258 - Right of Entry for Survey and Exploration
  - Used for survey, site exploration, environmental assessment, etc.
- Standard Form 2803 - Right of Entry for Construction
  - Typically used with an approved acquisition project when scheduling will not allow completion of acquisition of interests required to construct project

Leases

Standard Form 2

U.S. Government

Lease for Real Property

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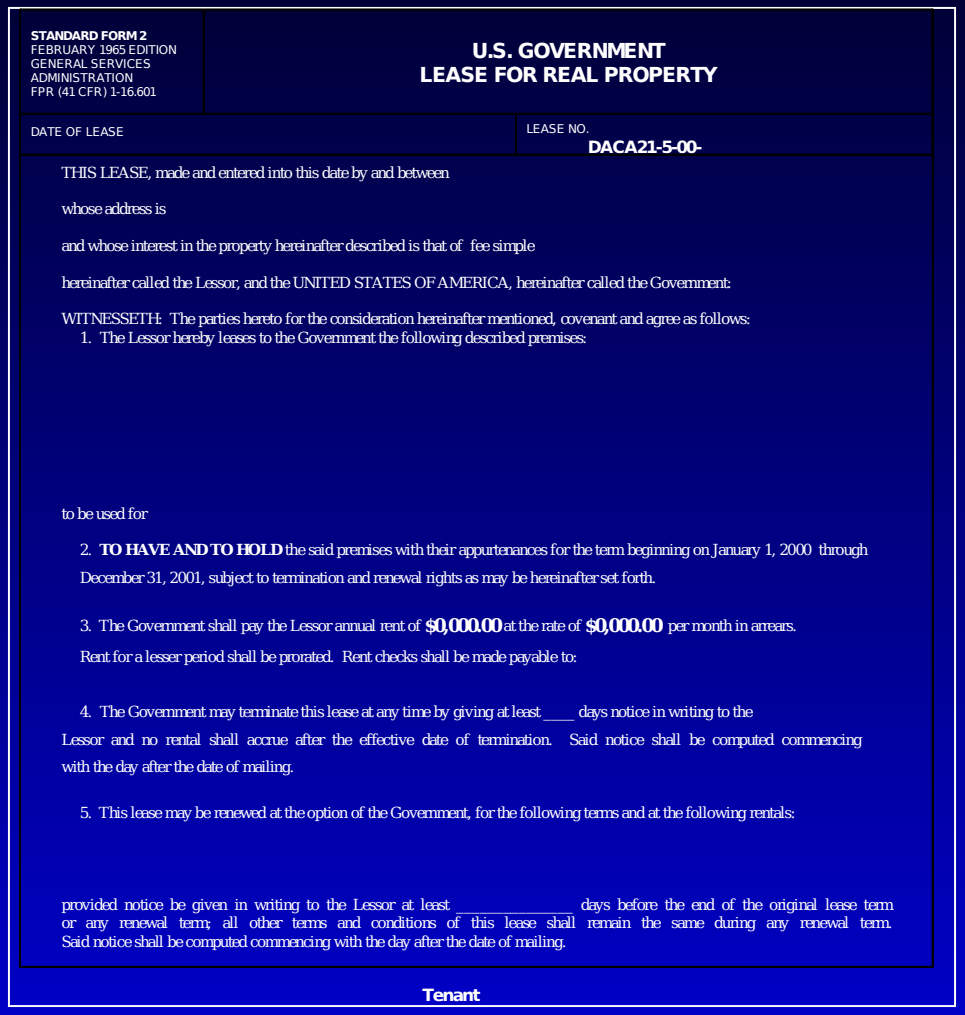


STANDARD FORM 2
FEBRUARY 1965 EDITION
GENERAL SERVICES ADMINISTRATION
FPR (41 CFR) 1-16.601

U.S. GOVERNMENT
LEASE FOR REAL PROPERTY

DATE OF LEASE

LEASE NO.
DACA21-5-00-

THIS LEASE, made and entered into this date by and between

whose address is

and whose interest in the property hereinafter described is that of fee simple

hereinafter called the Lessor, and the UNITED STATES OF AMERICA, hereinafter called the Government:

WITNESSETH: The parties hereto for the consideration hereinafter mentioned, covenant and agree as follows:

1. The Lessor hereby leases to the Government the following described premises:

to be used for

2. **TO HAVE AND TO HOLD** the said premises with their appurtenances for the term beginning on January 1, 2000 through December 31, 2001, subject to termination and renewal rights as may be hereinafter set forth.

3. The Government shall pay the Lessor annual rent of **$0,000.00** at the rate of **$0,000.00** per month in arrears. Rent for a lesser period shall be prorated. Rent checks shall be made payable to:

4. The Government may terminate this lease at any time by giving at least ____ days notice in writing to the Lessor and no rental shall accrue after the effective date of termination. Said notice shall be computed commencing with the day after the date of mailing.

5. This lease may be renewed at the option of the Government, for the following terms and at the following rentals:

provided notice be given in writing to the Lessor at least _____ days before the end of the original lease term or any renewal term; all other terms and conditions of this lease shall remain the same during any renewal term. Said notice shall be computed commencing with the day after the date of mailing.

Tenant

Lease Terms

Leases are generally made up of components or terms which consist of:

- Standard Provisions
- General Provisions
- Site Specific Provisions
- Exhibits such as:
  - Map or Floor plan
  - Schedule of Utilities and Services
  - Renovation Specifications

Standard Provisions

- Name and address of grantor
- Property Description and Property Location
- Purpose of Use
- Term of Instrument
- Rental Consideration
- Termination and Renewal Rights
- Responsibilities of Parties
- Signatures

General Provisions

- Alterations
- Restoration
- Condition Inspection (JS&I)
- Maintenance of Building and Premises
- Notices
- Subletting
- Failure in Performance
- Holdover Tenancy

General Provisions (cont'd)

- Applicable Codes and Ordinances
- Inspection
- Economy Act Limitation
- Lessor's Successors
- Electronic Funds Transfer Payment (EFT)
- Hazardous and Toxic Conditions
- Damage by Fire or Other Casualty

Mandatory General Provisions

- Officials Not to Benefit
- Gratuities
- Covenant against Contingent Fees
- Examination of Records
- Equal Opportunity Clause
- Disputes
- Prompt Payment Act
- Assignment of Claims

Negotiable Lease Terms

- Term of Lease
  - Firm term authority limited to one year
  - Firm term lease NOT recommended for disaster response activities
  - Month to month (or portions up to one year, depending on situation) with Government reserving unilateral right of cancellation is best
- "… for the term beginning on _____ through _____, subject to termination and renewal rights as may be hereinafter set forth and subject to adequate appropriation of funds …."

Negotiable Lease Terms (cont'd)

- Cancellation Rights
  - Government's rights
  - Lessor's rights
  - Should always include notice period
    - "…may cancel this lease in whole or in part at any time by giving 30 days notice in writing…"
  - Government's rights should allow cancellation of a lease "in whole or in part"
  - Need to consider the Government's investment in a facility when determining whether Lessor cancellation rights are acceptable

Negotiable Lease Terms (cont'd)

- Renewal Options
  - "The Government shall have the **right to renew** this lease from month to month or for a lesser period of time, under the same terms, conditions, and consideration provided herein."
  - "The Government shall **provide written** notice to the Lessor of the Government's intent to renew said lease within ___ **days of the expiration** date of said lease…"
  - subject to funding
  - provides final date which lease will not extend beyond

Negotiable Lease Terms (cont'd)

- Utilities and Services
  - Heat/AC (HVAC), water, gas, electricity
- **Services**
  - Janitorial and cleaning services
  - Garbage and trash removal
  - Grounds maintenance
- Included in lease or handled separately by contract?
- If included in lease, is it part of rental consideration or handled as adjustable pass-through?
- Janitorial Services -- What is needed? How often?
- Furnishings, telephone, T.V., long distance, soft goods?

Negotiable Lease Terms (cont'd)

- Escalation Clauses*
  - Generally used when agreement is made for Lessor to provide utilities and services as part of rental consideration (prevents separate contracting actions) but Lessor is unwilling to assume complete liability for cost
  - Agreement to adjust to "actual cost" on periodic basis
  - Must be tied to third party billing such as electric bill, janitorial services, taxes, insurance, etc.

*Leases for disaster response are generally short term in nature and would most likely only include escalation clauses to allow for payment of the actual cost of services and utilities rather than taxes, insurance or CAM.

Negotiable Lease Terms (cont'd)

- Rental
  - Appraised value should be basis for negotiations
  - In case of disaster response situation, appraisal process will be "abbreviated"
  - Chief of Real Estate has flexibility to enter into leases that are above appraised value when properly justified.
  - Remember, time is critical -- may have to pay more to lease on short notice for short time periods. You will be required to use best judgment.

Negotiable Lease Terms (cont'd)

- Alterations
  - Must identify exactly **what** alterations or modifications are needed
  - Must specify **when** they are needed by
  - Must specify **who** is responsible for making alternations and **who** will pay for them
    - Lessor Provides
    - Lump Sum Payment to Lessor
    - Combination
  - Define specific cost for alterations up front

Be sure the what, when and who is specified in writing in the lease instrument

Negotiable Lease Terms (cont'd)

- Restoration
  - Lessor can ask Government to restore leased property to the condition that existed prior to Government's occupancy
  - Government does not pay for damage caused by
    - reasonable and ordinary wear and tear
    - elements
    - circumstances over which it has no control, or
    - damage to Government-installed alterations
  - Should always try to negotiate a "Waiver of Restoration" if possible

Leases

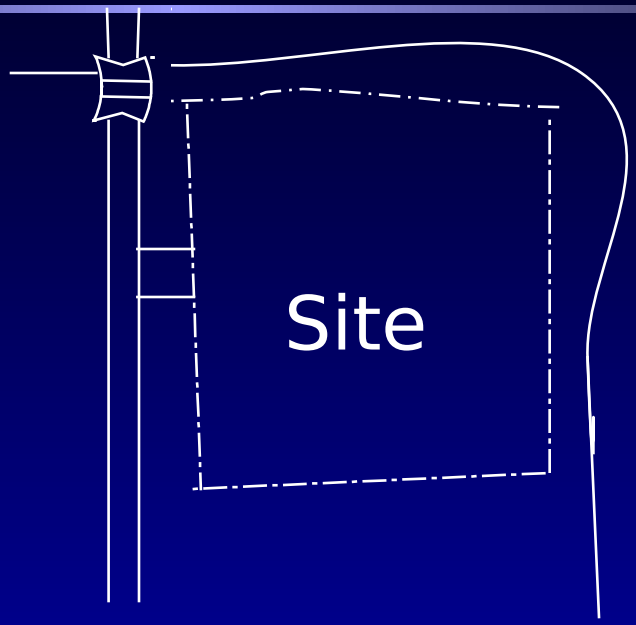
- You will find some or all of these provisions in SF 2, SF 2a, and ENG 856.
- Samples of each of these forms and clauses are provided

Lease Exhibits

- Maps and/or floor plans
  - Professionally printed or hand-drawn
- Schedule of Utilities and Services
- Renovation specifications
- Annotate on the second page of the Standard clauses specifically what exhibits are included as part of the lease instrument

Exhibits/Maps and Property Descriptions

map

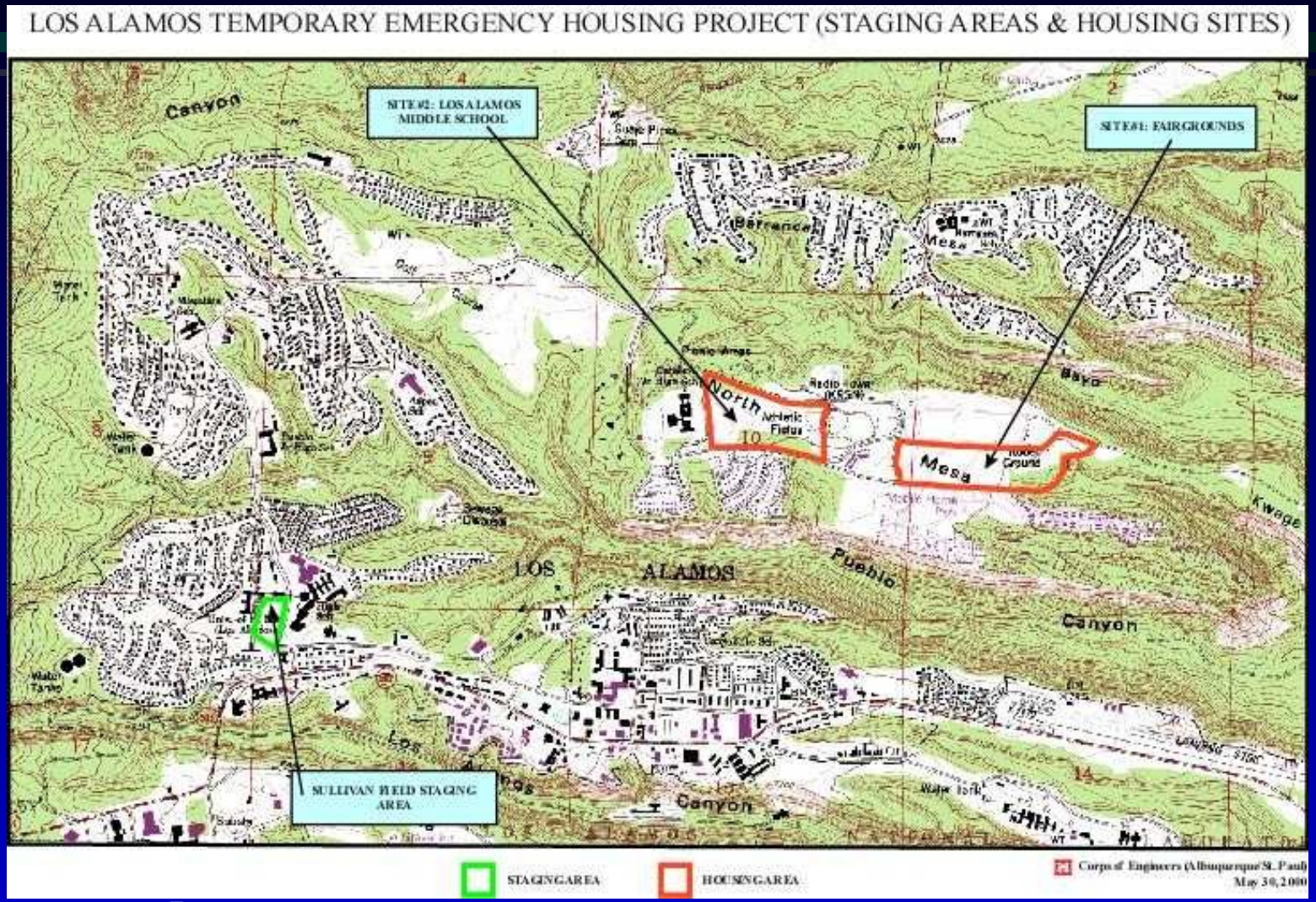


freehand drawing

…property described as: all rooms on floors 3 and 4, all vacant rooms on floor 2 less Room 205 (conference room), joint use of break rooms,…

narrative

Exhibits/Maps and Property Descriptions (cont'd)



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GSA Involvement

- When leases for administrative space are required in GSA designated areas, you must coordinate with the appropriate GSA realty specialist for that area.
  - Realty Specialist may be located in the ESF #7 cell at the DFO or you may need to contact responsible GSA Region
- GSA has established emergency and Disaster Leasing Procedures
  - Copy of GSA PBS Memorandum setting these out is attached
- Recommend your ERRO team leader coordinate with appropriate GSA POC well in advance of any event
- GSA may lease the space you need or they may delegate leasing authority to US Army Corps of Engineers

Land Leases

- Land Leases
  - generally will be obtained by locals (debris reduction, burn sites, trailer parks, etc.)
  - locally provided properties made available to the Corps by ROEs
  - locally obtained land leases should be reviewed before Corps activities commence
- US Army Corps of Engineers may obtain real property when locals cannot
  - FEMA coordination is recommended

Land Leases

- Land Leases, continued
  - When negotiating land leases, you need to know and understand
    - how the property is going to be used; changes to land etc.
    - what the contract specifies regarding site restoration
    - special environmental requirements (example: ground water monitoring)
  - Request by Lessor for anything not provided for in contract specifications should be closely coordinated with the mission manager before including as part of lease agreement
  - Recommend coordination with ERRO environmental cell

Locally Provided Interests

- Rights of Entry from local entities may be for
  - locally *owned* lands and facilities
  - locally *leased* lands and facilities
- Rights of Entry from locals for leased lands and facilities should have a copy of the base lease attached.

Reviewing Instruments for Locally Provided Lands (cont'd)

- What do I look for?
  - Purpose - Does it allow the use we intend? Lease Term -- Is it sufficient for our purposes?
  - Renewal Options -- Are there any, if needed?
  - Description of Property -- does it cover the area needed or intended? Is the description clear?
  - Termination Rights -- Does the Lessor have termination rights that could interfere with our proposed use?

Reviewing Instruments for Locally Provided Lands (cont'd)

- Exclusive Use - Does the lease provide exclusive use or did the owner retain any rights that might interfere with our proposed use?
- Specific Obligations of the Lessee
  - Lessor retained approval over certain types of actions
  - Lessor retained approval over plans and specifications for any site construction
  - Specific construction requirements - example construction of a specific number of trailer pads or use of specific types or size of materials in installation of infrastructure
- Insurance Requirements
  - Do these need to be included in our construction contract?

Reviewing Instruments for Locally Provided Lands (cont'd)

- Does it require Lessee to pay taxes?
- Does it have any hold harmless and indemnification clauses that we could not accept?
- Are there any particular types of requirements or hold harmless statements relating to HTRW and Environmental issues?
  - Does our environmental investigation work adequately protect us?
- Are there any specific restoration requirements?
  - If so, are they different than our contract requires? Can we or do we want to meet these requirements? Is there any action needed to cover?

Reviewing Instruments for Locally Provided Lands (cont'd)

- What do I do if I find any of these things?
  - Coordinate closely with Mission Manager and RE Team Leader
  - Advise local entities of potential problems
  - Advise local entities of items that will remain their responsibility if leased land is used.
  - Jointly with Mission Manager and locals, determine if problem areas can be re-negotiated or if alternate site should be used.
  - Assist locals by providing acceptable substitute language when appropriate

Real Property Acquisition

- COMMUNICAT
  E
- COMMUNICAT
  E
- COMMUNICAT
  E

RE Instrument Administration Issues

- Where do your instrument numbers come from?
- Has funding been appropriately certified and obligated?
- Who can sign the lease, ROE, permit?
- What happens after the instrument is signed?
  - Distribution -- Who needs copies? (Don’t forget the PRT and the on-site staff - they need lease and all exhibits)
  - Record Keeping -- Setting up files -- Where are the official copies kept – ERRO? District? With PRT or ERRO RE cell?
  - Payment -- Date entry into CEFMS? Initially? During the lease term who is responsible for monthly receiving reports and invoices?
  - Reporting - RFMIS? ENGLINK? CEFMS?
  - Payment for Alterations -- Is follow up needed?

RE Instrument Administration Issues (cont'd)

- **Joint Survey and Inspection**
  - Especially important at termination if there are any damage claims.
  - Can be narrative, pictures or video
- Were **utilities and services** provided as part of lease or is there action needed to set up by contract?
  - If contract is there an adequate system set up for receipt of bills and payment?
- Set up **suspense system** on instrument expiration dates and renewal options. (Be sure to notify mission managers/ERRO Chief of time requirements)
- Need to consider whether or not formal **releases** are needed as part of termination/expiration process

RE Instrument Administration Issues (cont'd)

- When setting up administrative files and processes, important to remember personnel will be rotating every 30 days. Clear and simple systems must be in place to be sure things do not get dropped in the hand-off.
- Be sure instrument files are clearly annotated with name and telephone number of Lessor or Lessor's representative for coordination purposes
- Establishing a check-list of activities with dates might be a good idea
- Make mission managers/ERRO chief aware of possible changes in use that will require lease modifications, such as additions or reductions in the space.

Supplemental Agreements

- Essentials of a Supplement Agreement
  - Parties to the Agreement
    - "…entered into by and between…"
  - Identify the lease or document that is being modified
    - "Whereas, on the 4th day of January 1996, the parties hereto entered into Lease No DACW 27-5-96-033 covering the use…"
  - Identify what you want to change; what you want to do
    - "Whereas, it is the desire and in the best interest of the Government to modify this lease to extend the expiration date."

Supplemental Agreements
(cont'd)

- Essentials of a Supplemental Agreement - con'd
  - Do it -- Make the change
    - 'Now therefore, these parties do covenant and agree that said Lease is amended, effective 15 August 1996, as follows:…"
    - State the consideration for the change, effective date of the change, specific paragraphs to be changed and describe exactly what is to be done (when-what-where)
    - State that all other terms and conditions remain the same
  - Signatures and Witnesses
  - Exhibits

Rights of Entry

Most commonly used real estate instrument in disaster response activities

Prototype June 2001

Sample Mission Specific, Temporary Roofing, ROE in Spanish

Use bolígrafo Solicitud Núm. _____

CANTIDAD ESTIMADA:	DSQ No qualifica WC Trabajo completado OS Fuera del ambito de trabajo BR Irreparable DO Hecho por otros	CANTIDAD FINAL:

Escriba en letra de molde y firme su nombre(s)

Inspector de Calidad: _____

Representante del Contratista: _____ GPS Localizado No _____ Sí _____

DEPARTAMENTO DEL EJERCITO

DERECHO DE ENTRADA PARA LA REPARACION TEMPORERA DE TECHOS

_____ (Proyecto, Instalación o Actividad)

_____ (Direccion Residencial)

El abajo firmante, más adelante llamado el "Dueño o Agente", por la presente concede a los Estados Unidos de América, más adelante llamado el "Gobierno", un permiso o derecho de entrada bajo los siguientes términos y condiciones.

1. El Dueño o Agente por el presente concede al Gobierno, sus representantes y/o contratistas un derecho para entrar en cualquier momento en los terrenos más adelante descritos dentro de un período de _____ ( ) meses desde la fecha de este documento para poder hacer reparaciones temporeras incluyendo, pero no limitadas a la instalación de tela plástica en los techos.

2. El permiso incluye el derecho de acceso y salida en otros terrenos del dueño no descritos abajo, disponiéndose que tal entrada y salida es necesaria y no de otro modo, convenientemente disponible para el Gobierno.

3. Toda herramienta, equipo y cualquier otra propiedad llevada o puesta sobre el terreno por el Gobierno permanecerá como propiedad del Gobierno y puede ser removida por el Gobierno en cualquier momento dentro de un período razonable después de la expiración de este permiso o derecho de entrada.

4. El Dueño también acuerda y afirma que relevará y librará al Gobierno de los Estados Unidos, sus contratistas y representantes de cualquier daño o pérdida sufrida de cualquier tipo, ya sea en la propiedad antes identificada o de las personas que se encuentren en el lugar, y por este medio releva de toda obligación, libera y renuncia a cualquier accion legal o en equidad, que el abajo firmante tenga o pueda tener de conformidad con este permiso o derecho de entrada.

5. El terreno en cuestión sobre el cual se otorga este permiso o derecho de entrada está localizado en _____, y se describe como sigue: *(Dibuje un croquis al dorso si es necesario)*

Certifico hoy _____ de _____ de 19 .

Por: _____
Firma del Dueño o Agente

_____
(Nombre en letra de molde)

_____
(Postal Dirección)

_____
(Teléfono)

Aviso:La intención de instalar la tela plástica en los techos es la de proveer reparación temporera, y no onstituye una solución a largo plazo para el techo damnificado. El plástico no provee un sello hérmetico contra el agua y ni garantiza que la estructura sea habitable. Estas reparaciones temporeras deberán ser reemplazadas por reparaciones permanentes lo ias pronto posible.

Nota Aclaratoria: Este documento en una traducción literal del inglés del formulario publicado como ENG FORM 1528 (revisión de CESAJ-DS-RE, mayo 1996). Cualquier conflicto que surja en la interpretaciones de este documento se dilucidará conforme lo expresado en la versión original en inglés.

Rights of Entry

- May be obtained directly from the private landowner or may be granted from the local government in support of a greater interest they are providing
- Standard Right of Entry form is usually modified to address specific disaster mission requirements
- Authorizes an act which, in absence of an ROE, would constitute a trespass

Rights of Entry

- Furnishes evidence of the permission granted to the US Government and identifies obligations, responsibilities, and liabilities assumed by the Government.
- Does not authorize any uses of property other than those specified in the instrument

Rights of Entry Forms

- Corps standard forms (SF 1258 & 2803)
  - Good start but generally must be modified for emergency work
  - Hold harmless
  - Delete flyover notification condition
- May need to draft form for specific missions
  - Recommend coordination of these forms with RE Team Leader and FEMA attorneys
- FEMA forms
- Mission specific ROEs (power, roofing)

Rights of Entry Recommended Components

(cont'd)

- Term
  - "beginning with the date of this ROE and ending 30 days following the vacating of the temporary housing unit"
- Certification of Ownership
  - "The undersigned hereby certifies and warrants that he/she is the record title owners or authorized agent of said owner"
- Purpose
  - "Said right and permission to enter is granted for the purpose of_____"

Rights of Entry Recommended Components

(cont'd)

- Special Requirements
  - Flagging utilities, reimbursement of insurance proceeds
- Consideration
  - "…in consideration of the President's Disaster Proclamation of _____ and the furnishing of a temporary housing unit by the United States to the undersigned…."
- Listing of property alterations agreed on (if any)
- Hold Harmless
  - "The undersigned further agrees and warrants that it and if applicable, its principal, will hold harmless the United States, the Federal Emergency Management Agency, the U S Army Corps of Engineers, their contractors and subcontractors for any damage of any type whatsoever…"

Rights of Entry Recommended Components

(cont'd)

- Signatures
  - Property Owner or Authorized Representative
  - Tenant/Occupant (if applicable)
- Exhibits
  - Maps/Property Descriptions
  - Leases obtained by locals
  - Certificates or Resolutions

Mission Specific and FEMA Forms

- Mission Specific
  - Temporary Roofing
  - Emergency Power/Generator Placement
  - General Debris Permit
- FEMA
  - Temporary Housing ROE Agreement
  - Landowner’s Authorization
  - Ingress-Egress Agreement
  - Temporary Housing Occupant Dwelling Lease
  - Mobile Unit Pad Lease

Signature Authority

- Local Governments
  - Requires signature of someone with authority to bind the specific entity
  - Normally will be backed up with some type of certification or resolution

Signature Authority

- Private Property
  - ROE's on private property generally should be signed by fee owner or owners or someone with authority to bind agency
  - ROE's on private property generally should always included tenants signature when applicable
- What support do you need -- deed, title, certification of ownership?
  - Generally, *certification of ownership* (or authority to sign)is all that is necessary

Signature Authority (cont'd)

- Examples
  - Leases should always be executed by the fee owner or a duly authorized agent of that owner
  - ROE's from local governments, municipalities, or public facilities should always be signed by someone having that authority
  - ROE's on private property for installing temporary roofing can be signed by occupant
  - Staging area for distribution of ice and water -- can probably accept verbal permission or signature of local store manager

Signature Authority ROEs

- ROEs to place a generator at a hospital requires someone with authority (don’t delay installation to obtain signature -- o.k. to get after the fact)
- ROEs on private property to remove debris - generally the fee owner and tenant
- ROEs on private property to install a temporary housing unit - generally fee owner and tenant
- ROEs on private property to demolish damaged structures - ALWAYS fee owner or owners and may require mortgagee’s signature

What do I tell the Owner or Tenant?

- Explain the activity to them
  - What Government representatives will be doing
  - How it will be accomplished
  - Type of equipment that is going to be used
  - Identify any potential for additional damage
- Advise them if there are any additional "qualifying" criteria that must be met
- Advise them of any additional requirements or activities they must complete (building permits or obtaining ingress/egress)

What do I tell the Owner or Tenant?

- Explain the instrument they are signing
  - What it authorizes
  - Special requirements
- Explain the Hold Harmless Clause
- Ask if any additional questions and if they still wish to proceed
- If known, advise them of process and approximate time frame for activity to happen

Who Obtains a Right of Entry?

- FEMA
- US Army Corps of Engineers Realty Specialist
- US Army Corps of Engineers Quality Assurance Person
- Contractor

Either FEMA, USACE Realty Specialist or USACE Quality Assurance Personnel may acquire, depending on the situation or mission to be accomplished. Every situation is different. If ROE is obtained by someone other than USACE Realty Specialist, recommend at least one or two realty specialist be on site at ERRO to assist, provide guidance, answer questions, etc. It is almost ***never a*** good idea to let contractor personnel obtain ROE's.

Permits

- Used to obtain the right to use property under the control of another federal agency
  - US Navy
  - Reserve property
  - Forest Service
  - Department of Labor

Resolutions

- Resolution – “A formal expression of opinion or will of an official body or public assembly, adopted by vote.”
  - Used to invoke authority to take action on public or private property which constitutes a threat to public health and safety
    - Authority to remove debris from rights-of-way within private subdivisions where roads have not been dedicated to local government
    - Used in connection with demolition of structures

Resolutions (cont'd)

- Resolutions may be needed in order for Counties or local municipalities to make their lands available
  - Example – provide signature authority to an individual such as county manager or county commission chairman for duration of disaster rather than requiring vote of entire commission
- Other forms of authority
  - Proclamations
  - Minutes of Commission meetings
  - Certificates of Authority

Risk Assessment

- You will need to make a ***risk assessment*** considering type of activity to be performed, urgency of completion, and magnitude of consequences if wrong parties give permission

Summary

What we do is the same as our routine work--- just faster!!

Questions?

Prototype June 2001